



**ROD UNDERHILL**, District Attorney for Multnomah County

600 County Courthouse • Portland, Oregon 97204 • 503 988-3162 • FAX 503 988-3643  
www.mcda.us

June 6, 2019

Gordon Friedman  
The Oregonian  
1500 S.W. First Avenue, Suite 400  
Portland, Oregon 97201

Alison Kean  
General Counsel, Prosper Portland  
222 N.W. Fifth Avenue  
Portland, Oregon 97209

Re: Petition of Gordon Friedman, for The Oregonian, requesting records pertaining to the hiring of Adam Lane

Dear Mr. Friedman and Ms. Kean:

In his public records petition, dated May 28, 2019, petitioner Gordon Friedman requests this office to order the Prosper Portland to disclose:

**The remaining written unredacted records pertaining to the hiring of Adam Lane by Prosper Portland.**

On May 7, 2017, Mr. Friedman made the following public records request of Prosper Portland:

- **The CFO application materials submitted by Adam Lane, including any supplemental information provided by Lane,**
- **Written records of or pertaining to Lane's application and/or evaluation for employment at Prosper Portland, including but not limited to his interview(s), reference checks, legal analysis or other actions taken to evaluate Lane's candidacy,**
- **Offer letter to Lane's employment.**

On May 17, 2019, Prosper Portland provided "all non-exempt documents, including all application materials, evaluations, reference checks, interview notes, candidate ranking matrices, and related emails." Nine records were withheld per ORS 192.355(9)(a) and ORS 40.225. These records included one memorandum labeled, "Confidential Attorney-Client Privileged Internal Memorandum" and two cover emails. The remaining materials not released at that time were six additional emails between general counsel and staff.

On May 20, 2019, Mr. Friedman emailed Shawn Uhlman, the public affairs and community engagement manager for Prosper Portland, requesting that the Executive Director waive the attorney-client privilege regarding the withheld documents.

On May 21, 2019, Prosper Portland released the six emails between staff and general counsel to Mr. Friedman, but did not release the Memorandum or the two cover emails, citing ORS 40.280. These three remaining documents are the subject of this appeal.

Mr. Friedman argues that the release of emails that were initially claimed as exempt due to attorney-client privilege was a voluntary waiver of privilege to all the documents, per ORS 192.355(9)(b). In the alternative, Mr. Friedman requests “a condensation from the record of significant facts not otherwise exempt.”

Ms. Kean has responded that the Memorandum and two cover emails are exempt communications because of the attorney-client privilege and that Prosper Portland did not waive the privilege in releasing some privileged emails.

After filing his appeal and reviewing Ms. Kean’s response, Mr. Friedman submitted that on June 4, 2019, Mayor Ted Wheeler<sup>1</sup> waived the privilege when he stated to Mr. Friedman the following:

Ultimately, it’s a hire she [Kimberly Branam, Prosper Portland director] made. But I can look into that...I can tell you what she told me, which is he [Lane] was ancillary to the bigger issue. That he was part of the agency [Ecotrust] but he himself was not personally involved. That was my understanding.

Ms. Kean further responded on June 5, 2019, that there was no waiver of the attorney-client privilege by Mayor Wheeler, as none of the “comments mentioned or characterized a legal memorandum or legal analysis, nor did his comments imply that they were based on a legal memorandum or legal analysis.”

## DISCUSSION

### A. Attorney-client privilege – ORS 192.355(9), ORS 40.225

ORS 192.355(9) exempts from disclosure under the public records law:

Public records or information the disclosure of which is prohibited or restricted or otherwise made confidential or privileged under Oregon law.

#### i. Applicability of privilege – ORS 40.225

The attorney-client privilege extends to public agencies<sup>2</sup>, except as expressly provided otherwise by the legislature, as we have previously discussed in *Petition of Manning*, MCDA PRO 19-19 (2019). ORS 40.225(1)(b) states that, “‘Confidential communication’ means a communication not intended to be disclosed to third persons other than those to whom disclosure is in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication.” In other words, this is a communication that occurs between the lawyer and the client and those persons that are involved with the client

---

<sup>1</sup> Mayor Wheeler is the City of Portland commissioner-in-charge of Prosper Portland, which was created under Section 15-102 of the City of Portland Charter.

<sup>2</sup> ORS 192.311(4) “Public body” includes every state officer, agency, department, division, bureau, board and commission; every county and city governing body, school district, special district, municipal corporation, and any board, department, commission, council, or agency thereof; and any other public agency of this state.



regarding the communication. Prosper Portland has general counsel which has been retained to provide legal advice to the public agency.

As a part of this appeal, Prosper Portland made a confidential submission under ORS 192.355(4) and ORS 192.422(2) of the three documents. The *in camera* review of those documents confirmed that these are attorney-client communications.

ii. Waiver of privilege – ORS 192.355(9)(b)

Even though the attorney-client privilege applies to public agencies, the legislature has determined that certain factual information must be released, if all of the following are true:

- (A) The basis for the claim of exemption is ORS 40.225 [attorney-client privilege];
- (B) The factual information is not prohibited from disclosure under any applicable state or federal law, regulation or court order and is not otherwise exempt from disclosure under ORS 192.311 to 192.478;
- (C) The factual information was compiled by or at the direction of an attorney as part of an investigation on behalf of the public body in response to information of possible wrongdoing by the public body;
- (D) The factual information was not compiled in preparation for litigation, arbitration or an administrative proceeding that was reasonably likely to be initiated or that has been initiated by or against the public body; and
- (E) The holder of the privilege under ORS 40.225 has made or authorized a public statement characterizing or partially disclosing the factual information compiled by or at the attorney's direction.

We do not find that Prosper Portland has waived its privilege. ORS 192.355(9)(b)(C) only addresses investigations internal to the public body when determining whether the public body has engaged in some form of wrongdoing. The Memorandum was created prior to hiring Mr. Lane. Mr. Friedman asserts that the Memorandum “factored into Lane’s employment at the agency.” If the Memorandum was created for the purpose of determining whether Mr. Lane should be hired by Prosper Portland, then it would follow that it was not created for the purpose of analyzing the “possible wrongdoing by the public body.” For that reason, ORS 192.355(9)(b) does not apply to these withheld documents.

With regard to ORS 192.355(9)(b)(E), Prosper Portland made it very clear in the response and release to Mr. Friedman’s second request of May 20, 2019, that Prosper Portland was relying upon ORS 40.280<sup>3</sup> in the release of previously withheld documents that were characterized as attorney-client privileged material. Prosper Portland did not make or authorize a waiver of privilege in responding to Mr. Friedman’s public records request.

Lastly, we consider whether Mayor Wheeler waived privilege in his statement to Mr. Friedman on June 4, 2019. Mayor Wheeler’s statement to Mr. Friedman does not reference the Memorandum or the emails that have been withheld. It is a matter of public knowledge that Mr.

---

<sup>3</sup> ORS 40.280 provides, in part, that “Voluntary disclosure does not occur when a public body, as defined in ORS 192.311 (Definitions for ORS 192.311 to 192.478), discloses information or records in response to a written request for public records made under ORS 192.311 to 192.478.

Page 4

June 6, 2019

Petition of Gordon Friedman

Lane was employed by Ecotrust.<sup>4</sup> Waiver of the privilege, per ORS 40.280, only occurs if the “holder of the privilege voluntarily discloses or consents to disclosure of any significant part of the matter or communication.” Mayor Wheeler’s comments lack any details and are cursory at best.

**ORDER**

Accordingly, the petition is denied.

Very truly yours,



ROD UNDERHILL

District Attorney

Multnomah County, Oregon

19-22

---

<sup>4</sup> <https://mailtribune.com/news/top-stories/-8-million-failure>